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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1953.

PALMER SHIPPING CORPORATION,
Petitioner,

v.

WILLIAM C. LUTH,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Palmer Shipping Corporation, prays that a writ of certiorari be issued to review a final judgment of the United States Court of Appeals for the Third Circuit entered on February 12, 1954 (R. 118), which judgment affirmed a final judgment of the United States District Court for the Eastern District of Pennsylvania awarding maintenance and cure to the respondent seaman covering the period subsequent to his refusal of necessary surgical care offered by the United States Public Health Service (R. 55).

SUMMARY AND STATEMENT OF MATTER INVOLVED.

The respondent filed a libel in personam in admiralty against the petitioner in the United States District Court for the Eastern District of Pennsylvania to recover damages for maintenance and cure and unearned wages which the respondent, as a member of the crew of Steamship "Nathaniel B. Palmer," claims to be entitled by reason of dis-

ability resulting from a gastric resection with residual gastritis, followed several months later by an incisional hernia (R. 50, 51, 52).

On August 2, 1951, while respondent was employed as boatswain on petitioner's Steamship "Nathaniel B. Palmer," he suffered an acute ulcer attack which resulted in his hospitalization at the British Hospital in Buenos Aires until October 11, 1951 (R. 50, 61, 62). Part of his stomach was excised and his lower teeth were extracted (R. 50). The petitioner arranged for his repatriation by air, so that he returned to his home in Philadelphia on October 17, 1951 (R. 50, 51). Between October 31 and November 27, 1951 he visited the United States Public Health Service station in Philadelphia for treatment to complete the healing of the abdominal incision. It was fully healed by December 21, 1951 when the attending physician gave him a statement certifying that he was "fit for full duty" as a seaman (R. 10). He also received a diet schedule to ease stomach pains after eating (R. 51), which had been his complaint before he joined the petitioner's vessel in May, 1951 (R. 8, 17), and he was advised to eat several small meals each day because of the reduced capacity of his stomach due to the gastric resection (R. 18, 63, 67).

When the respondent received his fit-for-full-duty certificate he immediately joined the crew of Steamship "Dorothy" as ship's carpenter (R. 10, 11). About two weeks later, he first noticed a small swelling in a portion of the abdominal incision, but it did not interfere with his work and he made no report of it to anyone (R. 12). He remained on this vessel until April 1, 1952, when he found that he could not maintain his diet or frequency of meals so he decided to take employment ashore (R. 13). He was rejected by a shipyard doctor who informed him that he had developed an incisional hernia (R. 13). On April 4, 1952 the respondent returned to the United States Public Health Service doctor at Philadelphia for examination (R. 20, 21, 37).

The diagnosis of hernia was confirmed, and he was advised to submit without delay to corrective surgery at Baltimore Marine Hospital (R. 21, 37, 38, 39). He admittedly refused to do so, on the ground that he could not support himself and his family during the period of convalescence (R. 14, 21).

The respondent was also advised to apply for a new set of upper and lower dentures at public expense so that he could masticate his food and reduce his gastritis (R. 21, 22, 40). No such application was made (R. 41).

The petitioner was not informed of the need for a hernia operation until June 20, 1952. At that time, the respondent's proctors demanded that petitioner guarantee his post-operative maintenance as a condition of accepting free surgery (R. 102, 103). When no such guarantee was given, the respondent shipped out as carpenter on Steamship "Carolyn" from July 2 through September 30, 1952, and thereafter he has been employed as a longshoreman, shoring up cargo on ships in the port of Philadelphia (R. 15, 16, 34, 35, 53). He has not requested new dentures or submitted himself for a hernia operation. At the time of the trial he complained that he was still feeling the same pains after eating which he experienced before he joined the petitioner's vessel, but not so severe (R. 17).

The District Court found that the respondent seaman's refusal to submit to surgery until the petitioner, as his former employer, would agree to pay for his maintenance and cure during the post-operative period was reasonable (R. 53). It also found that the respondent was entitled to (a) unearned wages from August 2 to August 31, 1951 when the voyage for which he had been employed was terminated, and (b) maintenance for the entire period from October 17, 1951 until February 3, 1953 when the trial was held, less any periods of employment during that time (R. 54).

The petitioner paid the award in respect to unearned wages and maintenance from October 17 through December 21, 1951. The award for maintenance from December

21, 1951, when the respondent obtained a "fit for full duty" certificate and returned to work, until the date of trial was appealed on the ground that respondent's refusal of proper treatment when duly offered to him thereafter barred his right of recovery for maintenance.

The Court of Appeals affirmed the judgment, holding that the rule barring maintenance to seamen after they have refused treatment "is not inexorably applied" (R. 115), and that his refusal to accept treatment in this case was justified (R. 116, 117).

This application for a writ of certiorari is presented to review the said decision as to the liability of the shipowner for maintenance and cure subsequent to December 21, 1951.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on February 12, 1954 (R. 118).

The jurisdiction of this Court to entertain this petition and grant the same is provided by Section 1254(1) and Section 2101(c) of Title 28 of the United States Code and by Rule 38, par. 5(b) of the Supreme Court of the United States.

OPINIONS BELOW.

The opinion of Judge Ganey of the United States District Court for the Eastern District of Pennsylvania, filed June 12, 1953 appears on pages 50 to 54, inclusive, of this record and is not reported.

The opinion of Judge Kalodner of the United States Court of Appeals for the Third Circuit, filed February 12, 1954, appears on pages 110 to 117 of the record and is reported in 210 F. 2d 224.

QUESTIONS PRESENTED.

1. Where a seaman refuses medical care for a condition which resulted from an illness arising in the course of his maritime employment, is he entitled to payment of maintenance and cure following such refusal?

2. If the seaman refuses such medical care on the basis of alleged indigence, where the evidence shows that he had sufficient funds to support himself and his family during a reasonable period of convalescence, that he did not notify his former maritime employer about the required treatment until nearly three months later, and that he has been variously employed as a seaman and longshoreman since the said refusal without submitting himself for treatment, should his former employer be obligated to pay maintenance for all periods of his unemployment subsequent to the refusal?

3. Is a seaman entitled to impose upon his former maritime employer the condition that payment of future maintenance must be guaranteed in advance before submitting himself to necessary medical care which has been promptly offered?

4. Where a gastric resection followed by residual gastritis requires the seaman to avoid intoxicants and certain types of food, and to eat smaller and more frequent meals for an indefinite time in the future because of the reduced capacity of his stomach, has that particular condition not received the maximum benefit reasonably to be expected from medical care?

REASONS FOR GRANTING THE PETITION.

The petition should be granted because:

1. The decision of the United States Court of Appeals for the Third Circuit in holding that respondent is entitled to payments of maintenance and cure after his refusal to

accept a prompt offer of hospital care is in conflict with prior decisions in this and other circuits which held that an offer of hospital services is a fulfillment of the shipowner's obligation to furnish maintenance and cure to an injured seaman. *United States v. Johnson*, 160 F. 2d 789 (C.A. 9, 1947), *United States v. Loyola*, 161 F. 2d 126 (C.A. 9, 1947), *June v. Pan-American Petroleum & Transport Co.*, 25 F. 2d 457 (C.A. 5, 1928), *The Saguache*, 112 F. 2d 482 (C.A. 2, 1940), *Marshall v. International Mercantile Marine Co.*, 39 F. 2d 551 (C. A. 2, 1930); *The Santa Barbara*, 263 Fed. 369 (C. A. 2, 1920), *The Bouker No. 2*, 241 Fed. 831 (C. A. 2, 1917), and *The Balsa*, 10 F. 2d 408 (C. A. 3, 1926). It is probably in conflict with the decision of this Court in *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 531 (1938), where it was stated that "courts take cognizance of the marine hospital service where seamen may be treated at minimum expense, in some cases without expense, and they limit recovery to the expense of such maintenance and cure as is not at the disposal of the seaman through recourse to that service."

2. The present decision constitutes an unreasonable extension of the exception to the foregoing general rule previously laid down by decisions in the Third Circuit, to the effect that rejection of hospital care does not forfeit a seaman's right to subsequent maintenance and cure unless such rejection is voluntary and without proper reason or excuse. See *Murphy v. American Barge Line Co.*, 169 F. 2d 61 (C.A. 3, 1948), cert. den. 335 U.S. 859 (1948), and *Sims v. United States of America War Shipping Administration*, 186 F. 2d 972 (C.A. 3, 1951), cert. den. 342 U.S. 816 (1951). This exception to the rule involves an important question of the federal law relating to sick and injured seamen which has not been, but should be, settled by this Court.

3. This decision, in holding that a seaman is entitled to require a maritime employer's advance guarantee of

maintenance as a condition for accepting medical care for the incisional hernia when promptly offered, is so far as petitioner knows entirely without precedent as a legal cause for rejecting care, and involves a further question of the federal law which has not been, but should be, settled by this Court.

4. The decision in holding that the respondent could have benefited by "medical treatment" for the residual gastritis is without support in the evidence. Respondent's own doctor testified that all he required was to avoid certain foods and to eat smaller and more frequent meals for such period of time as might be required for his stomach to enlarge to normal size (R. 24, 25, 29, 30). The finding that this amounted to medical treatment probably conflicts with the concept of "curative treatments" to which a seaman is entitled under the decision of this Court in *Farrell v. United States*, 336 U.S. 511 (1949). In any event, it does not justify an award of maintenance for periods when the seaman is following his diet schedule at home and is generally able to work as a longshoreman, in such an amount that he will receive maintenance as a seaman for every day he is not actually employed as a longshoreman.

Respectfully submitted,

PALMER SHIPPING CORPORATION,

By JOSEPH W. HENDERSON,

Of Counsel.

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss:*

JOSEPH W. HENDERSON, being duly sworn according to law, deposes and says that he is counsel for the petitioner herein and that the facts set forth in the foregoing petition are true and correct to the best of his knowledge, information and belief.

JOSEPH W. HENDERSON

Sworn to and subscribed before me this 21 day of April , 1954.

HARRISON G. KILDARE
NOTARY PUBLIC
My Commission Expires Jan. 25, 1955

I hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

JOSEPH W. HENDERSON,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

For Opinions Below, Jurisdiction, Statement of the Matter Involved, and Questions Presented see pages 1 to 5 of the Petition.

ARGUMENT.

I. A Seaman's Right to Maintenance and Cure Is Barred by Voluntary Rejection of Hospital Care.

The evidence in this case (summarized under Statement of Matter Involved) is clear and undisputed that the respondent seaman developed a small incisional hernia after he returned to his employment following the operation at Buenos Aires for which he had been receiving medical treatment from the petitioner between August 2 and December 21, 1951, and that when he had been working three months the need for limited diet and more frequent meals induced him to leave his maritime employment on April 1, 1952.

At that time he was informed by a shipyard doctor that he had an incisional hernia (R. 13). On April 4, 1952, the doctor at the United States Public Health Service Station at Philadelphia told him that he should submit to surgical correction of the hernia at Baltimore Marine Hospital (R. 21, 37, 38, 39). His refusal to accept this offer of treatment is undisputed (R. 14, 21, 38, 39, 53, 113).

An offer of hospital services is a fulfillment of the shipowner's obligation to furnish maintenance and cure to a sick or injured seaman. *United States v. Johnson*, 160 F. 2d 789 (C. A. 9, 1947), *United States v. Loyola*, 161 F. 2d 126 (C. A. 9, 1947), *June v. Pan-American Petroleum & Transport Co.*, 25 F. 2d 457 (C. A. 5, 1928), *The Saguache*, 112 F. 2d 482 (C. A. 2, 1940), *Marshall v. International*

Santa Barbara, 263 Fed. 369 (C. A. 2, 1920), *The Bouker No. 2,* 241 Fed. 831 (C. A. 2, 1917), and *The Balsa,* 10 F. 2d 408 (C. A. 3, 1926). The obligation of a seaman to obtain relief through recourse to the marine hospital service is recognized in *Calmar S. S. Corp. v. Taylor,* 303 U. S. 525, 531 (1938).

The opinion in the Court of Appeals acknowledged the existence of this rule and its relevancy to the present case (R. 113). Nevertheless, the court imposed upon the rule the condition that the refusal of the seaman to accept such care when offered must be "voluntary and without good reason or excuse" in order to bar him from further relief, following *Murphy v. American Barge Line Co.,* 169 F. 2d 61 (C. A. 3, 1948), cert. den. 335 U. S. 859 (1948), and *Sims v. United States of America War Shipping Administration,* 186 F. 2d 972 (C. A. 3, 1951), cert. den. 342 U. S. 816 (1951).

In the *Murphy* case, *supra,* the seaman could not afford the expense of travelling several hundred miles from his home to the nearest marine hospital. The court found that he was a penniless invalid and was in such pain that he could not work. Transportation expenses were awarded as a necessary incident of providing maintenance and cure under the special circumstances involved, which the court said did not amount to "voluntary" rejection of hospital care. In contrast to this situation, the present respondent was in no pain or discomfort from the hernia (R. 34), he could and did work as a seaman and as a longshoreman after the refusal to accept hospital care, and his travel expense was considerably less. This respondent raised an entirely different issue from that involved in the *Murphy* case by rejecting hospital care on the ground that he did not have enough money to provide for his support during convalescence.

The *Sims* case, *supra,* involved consequential damages for refusal to pay maintenance. It was contended that the shipowner's failure to pay maintenance had rendered it economically impossible for the seaman to secure the rest,

medication and proper diet prescribed for his gastric condition. No question of "voluntary rejection" was involved. The *Murphy* case was cited as dictum on the point that "it is not enough to give a sick man a hospital ticket; if he is ill and penniless, transportation to the place of treatment must be provided. • • • Financial inability to secure medical treatment can be as great a barrier as physical inability, and it was in this case" (186 F. 2d 972, at pages 974 and 975).

The present case attempts to limit the "voluntary rejection" rule still further. It goes far beyond the previously unprecedented obligation upon the shipowner to bring the patient to the place where the offer of hospital services may become effective. This may be justified on the logical basis that an offer of hospital service is meaningless unless the patient has sufficient funds for transportation, so that his suffering may be relieved. It is unreasonable and unjustified to permit a seaman to reject such an offer when no question of transportation is raised, and where he is neither penniless nor unemployable nor in pain.

The respondent imposed as a condition of accepting the offer of hospital care the shipowner's guarantee that maintenance would be paid during his convalescence. Such a condition is without legal or moral justification. He was not entitled to more than payment of his proper maintenance when he had accepted the operation and was actually disabled thereby. This promise on the part of the shipowner would amount to a contract without consideration, unless the seaman intended to obtain some benefit which he would not otherwise have been entitled to receive. It did not amount to legal cause for rejecting hospital care. He had no right to demand such a promise, and the shipowner was under no obligation to give it.

Furthermore, the rejection of hospital care in this case was not contemporaneous with the respondent's demand for an advance guarantee of maintenance. He refused the

operation on April 4, 1952. The demand for maintenance during convalescence did not come until June 20, 1952, nearly three months later (R. 52, 102). The refusal of care in April was "voluntary" within the meaning of the general rule. The lower courts nevertheless awarded the respondent his maintenance during the period *prior* to the demand (R. 53, 54).

The present case demonstrates the unjust burden placed upon shipowners through the attempted exception to the rule of voluntary rejection of care by seamen. If applied without a reasonable definition of "voluntary," it opens the door to countless abuses of the seaman's contract, by imposing any conditions on acceptance of medical treatment which devious minds may seek to contrive. The integrity of the maintenance and cure principle is involved. All shipowners and their underwriters are directly concerned in the result.

The situation requires prompt clarification by this Court, so that this important question of federal law may be settled.

II. The Evidence Shows that the Respondent's Refusal to Accept Medical Care Was Neither Reasonable Nor Proper, and Therefore Was Voluntary.

The basic importance of this case to the shipping industry is the extreme liberality of interpretation given by the Court of Appeals to "voluntary rejection" of medical care.

In finding that the respondent seaman was reasonable in refusing a hernia operation when offered to him in April, 1952, the Court below conceded that his excuse of indigence was open to question by his admission that he had just received over $1,000.00 in wages from his three consecutive voyages on Steamship "Dorothy". This was explained away in the opinion with the comment that "he had been at sea for three months; that he had a wife and son and he

maintained a home for them and when he returned from sea he had to discharge obligations incurred for the shelter and maintenance of his family during his absence'' (R. 116). There was nothing in the testimony to support the Court's conclusion that he had to discharge obligations incurred during his absence. The respondent testified that he had received the money but said nothing about meeting debts then due. His testimony referred only to his opinion that he would not be able to live on the money during convalescence (R. 14, 21, 102). He had only $367.93 for his support between October 23 and December 21, 1951 (R. 19). The Court below made no mention of that fact, nor that the respondent worked only 17 days between April 1 and July 2, 1952 (R. 13, 15, 52). His proved ability to sustain himself for at least two months, which the United States Public Health Service doctor testified was a reasonable period of recovery (R. 38, 39), contradicts the respondent's excuse of indigence.

If the respondent had a genuine excuse of poverty to reject medical treatment in April, 1952, he would not have waited until nearly three months later to bring this situation to the attention of the petitioner (R. 102).

Where a seaman is declared by competent doctors to be fit for duty, and thereafter he complains of some disability which he contends arose during his subsequent employment, the shipowner is justified in requiring proper proof that the new disability is connected with the former illness. There is no presumption that the two disabilities are causally connected. The shipowner is entitled to rely on a ''fit for duty'' certificate to the same extent as the seaman (R. 53; Finding of Fact No. 20). He is not bound to accept the seaman's assertion of liability, without strict and satisfactory proof, before undertaking to pay maintenance.

Under the present ruling of the Court below that a seaman may refuse medical treatment on the grounds which were found reasonable in this case, and still be entitled to

maintenance and cure, there is no limit to the conditions which may be imposed on the shipowner. The seaman may, for example, demand a guarantee that he shall receive maintenance for a period of recovery estimated by his own doctors rather than the shorter period estimated by government doctors, which occurred in this case. He may demand that payment be made in advance, which was declared by this Court to be contrary to the best interest of seamen in *Farrell v. United States*, 336 U. S. 511 (1949). He may spend his available funds in spite of alleged indigence and three months later demand a guarantee, as this respondent did.

The shipowner's obligation to pay maintenance and cure should be limited to a bona fide offer of adequate medical care. If any exception is to be made on the basis of a "voluntary" refusal, the line between "voluntary" and "involuntary" should be drawn in such terms by this Court that the shipowner's ancient obligation may not be unduly or unjustly extended.

III. Respondent's Residual Gastritis Had Reached the Point of Maximum Medical Improvement in December, 1951.

The respondent's doctor testified at the trial that the stomach pains diagnosed as residual gastritis which sometimes may follow a gastric resection required only the avoidance of certain foods and intoxicants (R. 24, 29). The petitioner's doctor testified that there was no reasonable basis to expect improvement or benefit from medical care (R. 42, 48). The finding of the Court below that the gastritis could have been improved by proper medical treatment (R. 117) is without support in the evidence.

Restricting the diet by avoidance of certain foods and intoxicants is not within the concept of curative treatment approved by this Court in *Farrell v. United States*, 336 U. S. 511, 519 (1949). In that case, the seaman was suffering from post-traumatic convulsions which admittedly

would require some medical care to ease attacks of headaches and epileptic convulsions.

To the extent that the Court below interpreted dietary control as curative treatment, the decision conflicts with the meaning of "curative treatment" as used in the *Farrell* case. This term requires a more concrete definition to avoid misinterpretation. Furthermore, maintenance during curative treatment should be limited to periods when the patient is under medical care and is actually disabled from working. Maintenance in the present case was awarded for all periods when the respondent was not employed, regardless of medical care and availability of shore employment.

Extension of the shipowner's obligation for maintenance and cure to the degree here shown indicates the pressing need for review, so that this important question of federal law relating to seamen may be settled.

IV. Conclusion.

We therefore submit that the petitioner's prayer for a writ of certiorari should be granted.

Respectfully submitted.

Joseph W. Henderson,
J. Welles Henderson,
Attorneys for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1953. No. 715.

PALMER SHIPPING CORPORATION,
Petitioner,

vs.

WILLIAM C. LUTH,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable EARL WARREN, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Respondent, WILLIAM C. LUTH, respectfully shows to your Honorable Court as follows:

I. COUNTER STATEMENT OF THE CASE.

A counter statement of the case is required. Petitioner's statement omits crucial facts upon which the two lower Courts reached their decisions. Petitioner's Statement ignores "the impact of its own conduct toward libellant * * *" which is the pivot around which the issue here has heretofore been, and must continue to be, resolved. (See Opinion, R-116.)

A complete and candid statement of the facts will demonstrate that this case presents only questions of fact which have been determined by both Courts below and which do not merit consideration by this Court.

1. Preliminary.

Respondent, a merchant seaman, claimed, and was awarded unearned wages, and maintenance and cure because of disability sustained in the service of his vessel. The Decree of the District Court was entered June 15, 1953. On July 2, 1953, petitioner paid respondent the unearned wages awarded him. On September 12, 1953, petitioner paid respondent that part of the maintenance and cure award which covered the period from October 17 to December 21, 1951.

These payments, made after trial and Decree, do not affect the Findings and Conclusions of the Trial Court; they did not affect the argument in, or the decision of, the Court of Appeals. For the purposes of the petition now before this Court, it is as if these payments had not been made.

The petition concerns only respondent's right to maintenance and cure and the Findings of Fact and Conclusions of Law of the District Court, and the affirmance by the Court of Appeals that "the record establishes that the District Court's fact findings were supported by the testimony and,

further, that it did not err as a matter of law in its award of maintenance to the libellant" (Opinion, R-115).

2. The facts.

Respondent's condition was diagnosed as an active duodenal ulcer (R-62, Libellant's Ex. 1, R-100). Two operations were performed at the hospital in Buenos Aires (R-63). These left a large abdominal scar (R-11). On October 11, 1951, respondent was released from the hospital with directions to follow a prescribed diet limiting the quality and quantity of food (R-63).

On October 17, 1951, Luth arrived in New York (R-63). He went on to Philadelphia, his home, where he was confined to bed for ten to twelve days (R-63). He then reported to the outpatient department of the United States Public Health Service Station in Philadelphia. There again he received a diet prescribing meals seven times a day (R-67).

Luth remained under outpatient care until December 21, 1951. He had not worked since leaving the vessel August 2, 1951. Following his repatriation and up to December 21, 1951, Luth made at least four demands for the payment of maintenance. It is undisputed that petitioner refused to pay maintenance notwithstanding that:

(1) Immediately after repatriation (October 18, 1951), respondent requested maintenance from petitioner's local agent (R-64);

(2) Following this, respondent's union officials made request for his maintenance from petitioner's New York office (R-64);

(3) Thereafter, respondent wrote several letters to petitioner requesting payment of maintenance (R-64);

(4) Respondent's counsel made demand for mainte-

nance upon petitioner by letter dated November 16, 1951 (Libellant's Exhibit 2, R-66, 101);

It was petitioner's demonstrated callous and contemptuous disregard of respondent's right to maintenance which prompted the Court of Appeals to say:

> "Respondent had inexcusably failed to discharge its obligation to pay the libellant maintenance from October 17, 1951 to December 21, 1951, despite his repeated demands" (Opinion, R-115).

Because of petitioner's refusal to pay him maintenance and unearned wages, Luth was compelled to return to work:

> "* * * December 21, right around that time I was just flat broke that I had to go to work" (R-9).

Despite his distressed physical condition, respondent was obliged to ask for and receive a "fit-for-duty" slip from the United States Public Health Service (R-10). The Court of Appeals found:

> "libellant was *prematurely compelled* to return to work on December 21, 1951, while he was still ill" (emphasis supplied, Opinion, R-116).

On the day Luth received the fit-for-duty slip he obtained employment on the S. S. "Dorothy", as carpenter, where he served from December 21, 1951 until April 1, 1952. Although this was easier work than boatswain, it was quite laborious (R-10, 11).

About two weeks after joining the S. S. "Dorothy", Luth noted a swelling at the site of the abdominal scars. He thought it was a "natural reaction to the surgery". In April, 1952, he was told that the swelling was an incisional hernia. It caused his rejection from employment by the Sun Shipyard (R-11, 12, 13). This finding was confirmed by the United States Public Health Service, where

Luth was told he needed an operation, and that he would have to "lay up from three to four months". Luth did not submit to surgery because he was without money to sustain himself during the period of convalescence (R-14; Libellant's Ex. 4, R-68, 102), which finding is confirmed by the Court of Appeals (R-116).

On June 20, 1952, Luth's counsel wrote to Petitioner and its counsel advising of Luth's desire to submit to surgery; and of his need for maintenance during convalescence, without which he would be unable to sustain himself during that period. Respondent requested assurance that maintenance would be paid during convalescence after surgery (Libellant's Ex. 4, R-68, 102). Petitioner did not reply to the letter.

Luth made one more sea trip. He was unable to continue thereafter. The work was "too rugged", and he could not "stand the food" (R-13). From then on he worked as carpenter, on the waterfront. That work was also laborious, and he was forty pounds underweight. Although work was available for him, he could not work every day (R-13, 31, 32, 68-70). Meanwhile, his counsel continued to demand maintenance, and petitioner continued to refuse to pay (Libellant's Exs. 5, 6, 7, R-70, 71, 103-105).

Luth earned about $1,000.00 on each of the two subsequent voyages which lasted about three months each. In both Courts below petitioner argued that from the earnings of either of these voyages respondent had sufficient money to maintain himself during convalescence. Petitioner ignored the testimony that respondent during each voyage supported his family of three and only the balance was available for future use. In other words, petitioner argues that $1,000.00 was sufficient to support Luth's family of three for six to seven months—about $30.00 per week.[1] As to this, the Court of Appeals said:

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[1] Compare this with petitioner's acknowledgment that maintenance for the seaman **alone** is $56.00 per week (3rd Conclusion of Law, R-54).

"The District Court did not subscribe to this contention, nor do we" (R-116).

Petitioner admits that up to trial Luth was suffering from (1) gastritis, resulting from the operations (R-97), and (2) an incisional hernia, also causally related to the operations (R-81, 94, 95).

It is not denied that when subjected to stress the hernia becomes prominently noticeable (R-81) and produces pain (R-28). Dr. Harold R. Wood, petitioner's physician, examined Luth April 4, 1952 and on June 24, 1952, he reported to defense counsel and "suggested that the hernia could be easily repaired and that it should be done" (R-96). It was also his opinion that Luth's digestive condition could be benefited by medical care (R-97).

Petitioner concedes that the disability was not sustained by any vice or misconduct attributable to respondent (21st Finding of Fact, R-53).

The Trial Court's finding is undisputed that following his repatriation, respondent was disabled for a period of 225 days, as the result of these conditions sustained in the service of the ship. The District Court awarded maintenance for these 225 days and found as a fact that during this period improvement in Luth's condition from nursing care and medical attention could reasonably have been anticipated (22nd Finding of Fact, R-53).

The Court of Appeals affirmed that judgment in an opinion by Judge Kalodner, which is reported in 210 F. 2d 224 (R-110-117).

II. ARGUMENT.

Two courts have already passed upon the facts of this case. The District Court and the Court of Appeals are in agreement that because of petitioner's persistent and inex-

cusable refusal to pay him maintenance, respondent's failure to avail himself of surgical treatment until petitioner agreed to pay maintenance during convalescence was "reasonable" (24th Finding of Fact, R-53, Opinion, R-115). Petitioner is now asking this Court to reverse this Finding of Fact.

1. There is no conflict.

This case is not in conflict with any case in any other circuit. It is not in conflict with any decision of this Court. No case in any jurisdiction condones the "economic pressure" (Opinion, R-116) to which petitioner subjected respondent. There is no case in any jurisdiction which permits a wrongdoer to profit from his own wrong.

2. Where the shipowner has persistently refused to pay maintenance, an indigent seaman is not obliged to submit to surgery without assurance that maintenance will be paid during convalescence.

Petitioner now urges this Court to reject the uncontradicted evidence upon which the District Court and the Court of Appeals determined that Luth's conduct was "reasonable" and that it "did not amount to refusal of treatment" (Opinion, R-115). There was no basis or warrant to reject that evidence in either of the Courts below, and none exists here.

Petitioner does not meet the issue; it confuses the issue. The clarity and definition of the issue depends upon the facts upon which the claimed "refusal" of April 4, 1952 is predicated. Significantly, all of these facts are omitted by petitioner. Petitioner's studied and deliberate refusals to pay maintenance prior to December 21, 1951, make it very clear that respondent's conduct was in no sense "voluntary".

Rather, it was an "inability to accept" medical care which was imposed upon the seaman by this shipowner, who now seeks immunity from liability for its own wrong.

Indeed, this distinction is the basis for the decisions. In all of the cases barring recovery of maintenance, the refusal was without good cause. The following are typical illustrations:

In *United States v. Johnson*, 160 F. 2d 789 (C. A. 9, 1947), the seaman refused hospitalization because "I couldn't see going back to another hospital. It was just one doctor's opinion against a whole dozen or more that I had seen already" (p. 798).

In *The Suguache*, 112 F. 2d 482 (C. A. 2, 1940), the seaman was found guilty of "leaving the Galveston Hospital without permission and after being discharged from the Fort Stanton Hospital for disciplinary reasons" (p. 483).

In *United States v. Loyola*, 161 F. 2d 126 (C. A. 9, 1947), "No excuse was given for not reporting to the Marine Hospital" (p. 128).

On the other hand, in *Murphy v. American Barge Line Co.*, 169 F. 2d 61 (C. A. 3, 1948), cert. den. 335 U. S. 859 (1948), the Court held it was the shipowner's duty to furnish a seaman transportation to a distant hospital and since it did not do so, the seaman's failure to avail himself of hospitalization did not amount to a refusal of treatment, precluding his recovery for maintenance and cure. See also *Spellman v. American Barge Line Co.*, 176 F. 2d 716 (C. A. 3, 1949).

Petitioner is wrong, therefore, when it says that respondent's failure to avail himself of surgery, *ipso facto*, barred him from recovering maintenance. The Court of Appeals is right; "Other factors must be taken into account and given effect" (see Opinion, R-115).

Some of the "other factors" present in this case are:

> (1) Petitioner's inexcusable refusal to discharge its obligation to pay maintenance from October 17 to December 21, 1951, despite respondent's repeated demands;

(2) Petitioner's inexcusable refusal to pay respondent his unearned wages despite respondent's repeated demands;

(3) Respondent's compulsion to return to work prematurely on December 21, 1951, while he was still ill, solely resulting from petitioner's conduct;

(4) Respondent's lack of financial resources other than his earnings;

(5) Finally, respondent's inability to work for several months during convalescence from the required surgery.

The only question in this case is whether respondent acted "reasonably" in view of his proven inability to maintain himself during convalescence, and of petitioner's refusal to pay maintenance. We urge that the mere offer of surgery, without more, did not discharge the obligation since petitioner refused to provide the means by which Luth was to survive thereafter. Its conduct *before* the offer of surgery makes it clear that petitioner had no intention of honoring its obligation *after* surgery. Respondent could only judge petitioner's future conduct by its past, and that judgment was held "reasonable" by both Courts:

> "The libellant had suffered as a result of this economic pressure and he was justified in being concerned as to how he would maintain himself during the post-surgery convalescence and in refusing to submit to surgery without assurance from respondent that it would pay him maintenance" (Opinion, R-116).

Respondent's conduct was reasonable. There was ample warrant for the 24th Finding of Fact (R-53).

3. The duty to provide maintenance and cure lasts so long as the seaman's need continues; so long as he can benefit from medical care and attention.

No claim is here made for maintenance for the balance of respondent's life. We are not here concerned with how long after trial respondent is entitled to maintenance. The only issue here is whether the 22nd Finding of Fact is right: that improvement in respondent's condition from nursing care and medical attention could reasonably have been anticipated (R-53).

A. The gastritis.

In June, 1952 (six months after the "fit-for-duty" slip) petitioner's physician, Dr. John Willard, examined Luth and found that he "was having digestive symptoms as a result of the conditions for which he had been operated and the condition resulting from the operation" (R-97). Dr. Willard stated that Luth was suffering from an aftermath of the operation, "a residual gastritis", and it was his opinion that Luth could benefit from medical care (R-97, 98).

Dr. Salzmann said that dietary care would relieve this condition (R-29). The medical witnesses are in agreement that this condition could have been improved by proper medical treatment and adherence to a diet. Respondent is entitled to maintenance.

Farrell v. United States, 336 U. S. 511 (1949).

B. The hernia.

Assuming, *arguendo*, that the gastritis is not in this case, petitioner is still liable for maintenance and cure to date

of trial. The testimony is undisputed that there was a direct relationship between the hernia and respondent's two operations in Buenos Aires. No one disputes that surgery would have benefited the incisional hernia condition. In view of this evidence, it is absurd for petitioner to contend that Luth is not entitled to maintenance and cure up to time of trial.

Lipscomb v. Groves, 187 F. 2d 40 (C. A. 3, 1951); *Brett v. Carras,* 203 F. 2d 451 (C. A. 3, 1953).

There appears to be no meritorious reason for disturbing the 22nd Finding of Fact that Luth's conditions could have improved by medical care and attention (R-53).

III. CONCLUSION.

The decision below involves no conflict. It has been decided against the petitioner by two lower Courts and involves no new or important legal principle. Rather, it applies well-established rules of law and logic to uncontroverted facts. It does not merit review by this Court.

Respectfully submitted,

PAUL M. GOLDSTEIN,
Proctor for William C. Luth, Respondent.

Of Counsel:
SAMUEL J. STARK
HERMAN MOSKOWITZ
STARK AND GOLDSTEIN